

STATE OF ALASKA

IBLA 88-432

Decided February 12, 1990

Appeal from a decision of the Alaska State Office, Bureau of Land Management, approving Native allotment application AA-7033 and rejecting in part State selection application AA-208.

Set aside and remanded; contest ordered.

1. Alaska: Native Allotments

Where the record in a Native allotment case contains evidence refuting the existence of substantially continuous use and occupancy at least potentially exclusive of others, a decision approving the allotment without any analysis of the facts to support the adjudication will be set aside as unsupported by the record and a contest ordered.

APPEARANCES: Lance B. Nelson, Esq., Assistant Attorney General, Anchorage, Alaska, for the State of Alaska; Mark Regan, Esq., Alaska Legal Services Corporation, Anchorage, Alaska, for Thomas Abbott.

OPINION BY ADMINISTRATIVE JUDGE HARRIS

The State of Alaska (State) has appealed from a decision dated February 10, 1988, by the Alaska State Office, Bureau of Land Management (BLM), approving the Native allotment application of Thomas Abbott (AA-7033) and rejecting in part State selection application AA-208.

On September 8, 1966, the State filed general purposes grant selection application AA-208 pursuant to section 6(b) of the Alaska Statehood Act of July 7, 1958, 48 U.S.C. ch. 2 § 6(b) (1982). The State, in its application, sought all lands in T. 30 S., R. 58 E., Copper River Meridian. On November 17, 1971, Native allotment application AA-7033 was filed with the Bureau of Indian Affairs by Thomas Abbott, pursuant to the Act of May 17, 1906, as amended, 43 U.S.C. §§ 270-1 through 270-3 (1970). ^{1/} In that application, Abbott claimed use and occupancy since 1956 of 160 acres of unsurveyed land located in sec. 34, T. 30 S., R. 58 E., Copper

^{1/} The Allotment Act was repealed by section 18(a) of the Alaska Native Claims Settlement Act (ANCSA), 43 U.S.C. § 1617(a) (1982), on Dec. 18, 1971, subject to applications then pending before the Department.

Abbott's application was pending before the Department on that date.

River Meridian, within the floodplain of the Kicking Horse River. ^{2/} In his application, Abbott listed "temporary drying racks" as improvements. In section 5 of the application entitled "FISHING, TRAPPING, AND OTHER USES OF THE LAND," the following information appeared: "1920 Trapping Seasonal" and "1940 to present Hunting season, Fishing season - subsistence food acquisition." In the remarks part of that section, Abbott added:

Used for Picking Cranberries + Moose Hunting + My Dad used the Land for making Halligan Grease + for trapping wolfe [sic] + coyote + mink from 1920 to 1940.

On October 21, 1972, BLM conducted a field examination of Native allotment AA-7033. In the report of that examination, dated March 6, 1973, the field examiner found that Abbott had marked the northwest corner of the allotment, which was very close to the northwest corner of section 34, by placing his name in a waterproof wrapper on a spruce tree. He stated that claimed uses of the land were "trapping, hunting, and fishing." He also stated, however, that "[t]here are no fish in the Kicking Horse River," ^{3/} and that the floodplain was used for public access for hunting. He further reported that "[w]itnesses stated that [Abbott] had done a lot of hunting in the area." The examiner recommended that the allotment be approved because "use of the land is sufficiently nebulous so that it would be impossible to disprove."

By letter dated October 2, 1979, BLM notified Abbott that on the basis of the field examination, which had "found no visible evidence of your use and occupancy on the land, * * * it appears that you have not met the requirements of the Native Allotment Act for the claimed lands." BLM allowed Abbott 60 days within which to submit evidence in support of his claim.

On December 5, 1979, counsel for Abbott filed with BLM (1) a statement by Abbott, (2) a request for an extension of time within which to file third-party witness statements, and (3) a request for a hearing. Abbott's statement represented that he had a campsite on the land, that in the fall months he used the land for hunting and berry picking, and that he did not use the land between 1975 and 1978 because he was commercial fishing.

BLM replied on December 19, 1979, granting a 60-day extension of time for the submission of additional information in support of the use and occupancy requirements. BLM did not address the request for a hearing, and the record does not disclose that any subsequent request for a hearing

^{2/} On Oct. 20, 1987, in order to resolve a boundary conflict with another Native allotment application, the description of AA-7033 was amended from the S $\frac{1}{2}$ NW $\frac{1}{4}$, N $\frac{1}{2}$ SW $\frac{1}{4}$ sec. 34 to the S $\frac{1}{2}$ of the N $\frac{1}{2}$ of sec. 34. ^{3/} Although Abbott's allotment application included the statement that the land was utilized during fishing season for subsistence food acquisition, Abbott did not expressly state in that application, or in any of his subsequent statements, that he used the land for fishing purposes.

was made. No third-party witness statements were filed with BLM within the time as extended.

On October 22, 1980, BLM issued a decision tentatively approving State selection AA-208, excepting from its approval several Native allotment applications, including AA-7033. Thereafter, on May 24, 1983, Abbott's brother-in-law, Fred C. Phillips, filed with BLM an affidavit in which he stated that in 1963 or 1964 he and Abbott had hunted on the land described in AA-7033, and that Abbott "didn't have any improvements on the land since he used it for hunting."

In an affidavit, dated May 28, 1987, and filed with BLM on June 9, 1987, Abbott stated that he applied for his allotment "to cover my hunting and berrypicking area on the Kicking Horse River." He stated further that he was born in 1936 and first visited the site when he was about 9 years old with his uncle and that they picked cranberries. He indicated that although he had stated in his application that he began using the land in 1956, "[t]hat is not correct as I first began going to my land in about 1946." He claimed that he usually makes several trips each fall to hunt for moose and pick cranberries and that he "often camp[s] two or three nights."

In the decision now before us BLM found that the lands sought in Native allotment application AA-7033 had been validly selected by the State on September 8, 1966. BLM determined, therefore, that the allotment application was not legislatively approved but was subject to adjudication pursuant to section 905(a)(4) of the Alaska National Interest Lands Conservation Act (ANILCA), of December 2, 1980, 43 U.S.C. § 1634(a)(4) (1982). ^{4/} BLM approved Native allotment application AA-7033, stating:

Based upon adjudication of the application, this office has determined the applicant has used the lands applied for and satisfies the use and occupancy requirements of the Act of May 17, 1906, supra. At the time the claim was initiated, the lands were vacant, unappropriated and unreserved.

BLM rejected the State's selection application as to the lands in AA-7033 because it found them to have been appropriated by Abbott's occupancy at

^{4/} Section 905 of ANILCA, 43 U.S.C. § 1634 (1982), approved Native allotment applications pending before the Department on or before Dec. 18, 1971, which described either land that was unreserved on Dec. 13, 1968, or land within the National Petroleum Reserve in Alaska, subject to certain exceptions. Subsection 905(a)(4), 43 U.S.C. § 1634(a)(4) (1982), required adjudication of Native allotment applications which conflict with State applications pursuant to the Alaska Statehood Act filed prior to Dec. 18, 1971, where the land was not withdrawn under section 11(a)(1)(A) of ANCSA (a "core" township of an eligible Native village).

the time the State selection was filed. BLM allowed the parties 60 days for initiation of a private contest against AA-7033, and, failing the initiation of a private contest, an additional 30-day period to appeal from its decision.

The State allowed the time for filing a contest to expire, electing instead to appeal BLM's decision to this Board. The State contends that Abbott did not meet the statutory use and occupancy requirements and requests that the decision be set aside and the case remanded to BLM with instructions to initiate a Government contest.

With its statement of reasons, the State has submitted witness statements of five residents of the Haines, Alaska, area. In their statements, the residents claim familiarity with the land being sought in Abbott's Native allotment application but deny having observed any use or occupancy by Abbott. The State contends that BLM's decision approving the allotment is unsupported by the record which contains no satisfactory proof of substantial actual possession and use of the land, and is contrary to applicable decisions of the Board.

Counsel for Abbott has moved to strike the witness statements submitted by the State for the first time on appeal and contends that the record supports BLM's approval of Native Allotment application AA-7033.

We deny counsel's motion to strike. In Katmailand, Inc., 77 IBLA 347, 352 (1983), in the context of addressing a motion to strike certain affidavits presented on appeal by the appellants, the Board stated:

Among the Board's responsibilities is review of the factual as well as legal bases of an appealed decision. It would make no sense to rule that, even though the Board has the authority to review the factual basis of a decision and order fact-finding hearings under 43 CFR 4.415, an appellant may not present new evidence on appeal challenging that decision.

Thus, the witness statements submitted by the State are considered part of the record in this case.

Section 1 of the Act of May 17, 1906, authorized the Secretary of the Interior "in his discretion and under such rules as he may prescribe" to allot up to 160 acres of vacant, unappropriated, and unreserved non-mineral land to a Native Alaskan who is head of a family or 21 years of age. 43 U.S.C. § 270-1 (1970). The principal statutory prerequisite for proving entitlement to an allotment is that the claimant must submit satisfactory proof "of substantially continuous use and occupancy of the land for a period of five years." 43 U.S.C. § 270-3 (1970). As defined by the Department, such use and occupancy "contemplates the customary seasonality of use and occupancy * * * of any land used by [the applicant]" but must be "substantial actual possession and use of the land, at least

potentially exclusive of others, and not merely intermittent use."
43 CFR 2561.0-5(a). 5/

A Native allotment applicant, no less than any other public land claimant, is required to establish compliance with the applicable laws and regulations and, thus, to bear the burden of establishing entitlement to an allotment. Ira Wassilie (On Reconsideration), 111 IBLA 53, 59 (1989); Angeline Galbraith, 97 IBLA 132, 155, 94 I.D. 151, 163 (1987), reaffirmed, Angeline Galbraith (On Reconsideration), 105 IBLA 333 (1988). Where an applicant has not established entitlement to an allotment, BLM is required to provide an applicant with notice and an opportunity for a hearing at which the applicant may attempt to show compliance. See Donald Peters, 26 IBLA 235, 83 I.D. 308, sustained on reconsideration, 28 IBLA 153, 83 I.D. 564 (1976). See also Pence v. Kleppe, 529 F.2d 135 (9th Cir. 1976). In determining whether a contest is necessary, it is BLM's obligation to examine the entire record to ascertain whether an allotment applicant has shown entitlement by a preponderance of the evidence. See United States v. Estabrook, 94 IBLA 38, 52 (1986). Viewed under these standards, the decision of the Alaska State Office is inadequate.

[1] BLM's decision contains no analysis of the facts to support its adjudication, and the evidence is in conflict as to whether Abbott's use was substantial and continuous and at least potentially exclusive of others. As a matter of law, mere use of the land for a few days each year, absent any physical improvements, does not constitute continuous use and occupancy potentially exclusive of others. Abbott's alleged use in this case is similar to the use claimed in United States v. Estabrook, supra, where the Board held that use of land as a base camp for hunting twice a year for a period of a few days to a week was not a qualifying use when there was no proof that claimants' use potentially excluded others who used the land for the same purpose. Id. at 53. The record before us contains only scant evidence of Abbott's physical presence on and use of the land. As we noted in Angeline Galbraith, supra at 168, 94 I.D. at 170, physical evidence such as a campsite, fire pits, fish drying racks, tent frames, shelters, and even trails or paths, may be probative of exclusivity, alerting others that the land is or may be claimed by someone else. Angeline Galbraith (On Reconsideration), supra at 338-339. We conclude that BLM's adjudication is not supported by the record, and we will therefore remand the case to the State Office to issue a contest complaint. See Angeline Galbraith, supra; State of Alaska, 85 IBLA 196 (1985). 6/

5/ In George v. Hodel, No. A86-113 (Apr. 30, 1987), the District Court reversed a decision of this Board in Jimmie A. George, Sr., 60 IBLA 14 (1981), and held that the Department's interpretation that a Native allotment applicant's use and occupancy must be independent and exclusive of immediate family members was unreasonable and inconsistent with the Native Allotment Act and its implementing regulations.

6/ The State also argues that BLM erred in including in the allotment description a portion of the Kicking Horse River because there is no indication that Abbott ever used the river bed and because the Kicking Horse River is navigable under the standards set forth in State of Alaska

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is set aside and the case file is remanded with instructions to initiate a contest of Native allotment AA-7033.

Bruce R. Harris
Administrative Judge

I concur:

Wm. Philip Horton
Chief Administrative Judge

fn. 6 (continued)

v. United States, 662 F. Supp. 455 (D. Alaska 1987), appeal docketed, No. 87-3555 (9th Cir. July 24, 1987). Since title to beds of navigable inland waterbodies in Alaska passed from the United States to Alaska when Alaska entered the Union under the "equal footing doctrine," beds of such waterbodies "are neither available for selection nor chargeable to either the ANCSA or the Alaska Statehood Act entitlements." State of Alaska v. United States, supra at 457. The State may seek to pursue this issue in the contest hearing.